THE UNITARY MANAGEMENT ORDINANCE

AN EVALUATION OF WATER ADMINISTRATION IN THE PROPOSED CSKT COMPACT

Prepared by

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Quotes on the Unitary Management Ordinance

"...the response is to remind the tribes about the Grand Bargain, and the fact that we agreed to do this extraordinary thing, frankly, with respect to agreeing to subject or to remove non-Indian rights on the reservation from the jurisdiction and control of the state, and place that somewhere else at the tribe's request." ~Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission, August 2012

"It's a simple question. If the board's removed from the compact, the mechanism for the compact to move forward ceases. It's pretty much that simple." ~John Carter, Attorney for CSKT, October 2012, on the Compact without the Unitary Management Ordinance

"The Unitary Management Ordinance is non-negotiable" ~Rhonda Swaney, Attorney for CSKT, June 2014

Introduction

This paper is submitted to the Water Policy Interim Committee (WPIC) by Concerned Citizens of Western Montana as an evaluation of the Unitary Management Ordinance (UMO)[1] component of the proposed negotiated compact with the Confederated Salish and Kootenai Tribes (CSKT). The purpose of this document is to demonstrate the foundational problems with the UMO and why it is an unnecessary component of the proposed Compact given the existing legally-based, tested, viable alternatives to it for water administration in the Flathead Compact.

We recognize that according to the Compact Commission's (Commission) and Tribes' negotiated agreement the UMO is *non-negotiable*. However, we are also cognizant of the facts of law, policy, economics, and other factors that suggest the UMO may be *non-doable* by any branch of state, federal, or local government. Thus it remains important to provide critical information to decision-makers so as to enable an informed assessment of the proposed CSKT Compact and whether the legislature is required to, can, or should include the UMO in the Compact. As Commission Chairman Chris Tweeten notes, this decision is ultimately up to the legislature:

> *... but the ultimate decision to put that relationship in place, where the Unitary Management Board would have the authority to regulate non-Indian water uses on the reservation would be an act of judgment on the part of the legislature in pursuit of its constitutional power. So in that sense, the state jurisdiction is being exercised, it's just being done to vest authority in this particular body.*[2]

What is clear from this statement is that the Commission understands that the State has a constitutional duty to its citizens regarding the ownership and administration of water, that the Commission negotiated an agreement where the State's constitutional authority was delegated to the CSKT, and that the final decision rests with the Montana legislature.

At the heart of the decision on water administration for the Flathead Compact, then, is the constitutional duty to *all* citizens and compliance with state and federal law. The following presents information relative to factual deficiencies of the UMO and the availability and viability of existing alternatives for water administration.

History: How the Stage was Set

The place that the legislature is in today regarding the approval of the unitary management ordinance (UMO) is a result of a series of decisions resulting from CSKT legal action against the state that ultimately culminated in the 1996 *Ciotti* decision preventing the State from issuing permits and changes

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[1] The UMO has been renamed to be the "Law of Administration" of the proposed Compact, but the term "Ordinance" is central to the actual form of the UMO. If it is ratified, it becomes State law. Under the equal protection doctrine, must it apply to all state citizens?

[2] August 2012 Commission meeting, Helena, transcript of recording

of use on the reservation "*until* the Tribes quantified their federal reserved water rights".[3] In or around 2010, the Compact Commission decided to use a novel interpretation of this decision as a basis to promote the Unitary Management Ordinance in the CSKT Compact, which would overturn state administration, keeping the *Ciotti* decision in place.

In 2001 and again in 2003, the CSKT announced[4] their position that they considered themselves the owners of all the water within the exterior boundaries of the reservation.[5] The Tribes asserted that since they were the owners of the resource, they had and should have the sole authority to administer water. The CSKT have never wavered from this position.

Currently, the abstracts of Tribal water claims contained in the proposed Compact verify that the Tribes are claiming most, if not all of the water within the exterior boundaries of the reservation. The Flathead Compact differs from all the other Tribal Compacts in Montana as in not having the quantified volume of the water right stated up front in the document. Instead the Tribes' claims are listed in the abstracts, and they do in fact include all the water within the Flathead Indian Reservation and the tribe exerts ownership to a considerable amount of water off-reservation.

State-Federal-Tribal negotiations on interim water management plans post-Ciotti failed and in 2003 the CSKT submitted their first Unitary Management Ordinance to the Compact Commission.[6] The UMO was rejected by the then Compact Commission. Subsequent litigation[7] brought by the Tribes confirmed that the key to moving forward with state administration was the Tribes' quantification of *their* water rights. Thus, once the Tribes water right is quantified, the State legally does not need the UMO to resume administering water for state users on the Flathead Reservation.

The Compact presumably quantifies the Tribes' federal reserved water right. However, instead of proposing the resumption of state administration of state based water rights, the Commission instead negotiated an agreement that called for the state to turn over all of its authority to the Tribes' UMO, using the Ciotti decision to claim a jurisdictional vacuum and to justify a UMO it had previously rejected. As recently as October 2012 Commission Chairman Chris Tweeten stated:

> *John, let me just add to that, you touched on the first part of the question about why the Unitary Board is a good idea. On this caveat with respect to what you said, from our side of the table, going back to the beginning, I don't think we ever conceded that dual administration would not work, on this reservation, and I think what we're exploring to try*

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[3] Ciotti, 278 Mont. at 55, 923 P.2d at 1076. Over the 34-year period spanning 1980-2014, the Tribes have been in litigation against the state for 11 of those years

[4] "Liquid Assets", Missoulian , 2002

[5] Even prior to this announcement, the CSKT had succeeded in 1991 to compel the state to put a disclaimer on all new water permits issued in western Montana claiming that off-reservation water use would impact the on-reservation use of the Tribes' federal reserved water rights.

[6] In form and substance, the 2003 UMO looks substantially like the document submitted to the Montana legislature in 2013.

[7] The Tribes continued to file suit against the Montana DNRC, carrying the Ciotti case's prohibitions further. See CSKT v. Cinch (1999) and progeny.

to reach this compact, is whether or not unitary administration will work better in the context of this reservation in lieu of a dual administration work and I think we'll just leave that question at that.

To our knowledge, the Commission has never developed an alternative administration program based on previous models for consideration by the legislature. This has produced an informational vacuum, not a jurisdictional one.

Context and Framework for UMO Decision-Making

Whether in a negotiation or adjudication framework, the quantification of federal reserved water rights operates within the framework of history, individual state and United States constitutions, federal and state statutes, and case law. The evaluation of the UMO within this context can be tasked as four interrelated questions:

1. *Is the UMO legally required to settle the federal reserved water rights of the CSKT?*
2. *Is the UMO necessary to resuming state administration of state-based water rights?*
3. *Is there a reason why a dual sovereign state-tribal/federal water administration program as in other compacts would not work?*
4. *Is the UMO legally, administratively, and constitutionally sufficient to implement Montana's water administration duties and authorities for state water users on the Flathead Indian Reservation?*

The first three questions can be addressed very simply and with adequate documentation to demonstrate that while the UMO may be the desired outcome of the negotiated settlement, it is not necessary to resolving the fundamental task at hand: the quantification of the CSKT federal reserved water rights on reservation. The answer to the fourth question, regarding the adequacy of the UMO as a substitute for the State's system, relies on information gleaned from a broad scope and depth of existing law and precedent, as presented below.

1. Is the UMO legally required to settle the federal reserved water rights of the CSKT?

No. Given the history and context of the CSKT Compact negotiations as discussed here and elsewhere, the UMO is not legally required to settle the federal reserved water rights of the CSKT either through a negotiation or adjudication.[8] The controlling federal law regarding adjudication or negotiation of federal reserved water rights, the McCarran Amendment, defers to state administration of the water resources within its own state. Federal reservation and appropriation of water for the Flathead reservation was implemented pursuant to State law. The federal government severed its control over water resources in

[8] "Federal Reserved Water Rights", presentation to WPIC CSKT Technical Working Group June 25, 2014, on line at http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/June-25-2014/Exhibits/KVandemoerPresentation_June_25_2014.pdf

the states with the 1877 Desert Land Act.[9] There is no compelling legal reason to adopt the UMO as it is an unproven, untested system that would put Montana citizens at risk because it removes them from the protection and laws of the State.

2. *Is the UMO necessary to resuming state administration of state-based water rights on the reservation?*

No. The *Ciotti* prohibition on state administration is effective only until the Tribes have quantified their federal reserved water rights. Since the Compact Commission asserts that the proposed Compact quantifies the CSKT federal reserved water rights, technically the Ciotti prohibition is no longer effective and the state is free to resume administration of state-based water rights along the same model as every other Montana Tribal compact, where the state manages its water users and the Tribes are free to develop a Tribal water code for their water users.

3. *Is there a reason why a dual sovereign state-tribal/federal water administration program as in other compacts would not work?*

No. Commission Chairman Tweeten concedes that no evidence has been submitted that would show why the dual sovereign system of administration employed in other compacts would not work. But the Commission failed to produce such an alternative water administration system modeled after other tribal compacts for consideration by the legislature and gave the legislature only one option---the UMO.

4. *Is the UMO legally, administratively, and constitutionally sufficient to implement Montana's water administration duties and authorities for state water users on the Flathead Indian Reservation?*

The overall answer to this question is also, "No". The UMO is deficient and is not a good substitute for Montana law regarding water administration, and requires a deeper study of the intent of the UMO to substitute for State law, and the statutory, legal, and policy context involved in the decision to judge the UMO inapplicable and unnecessary to the resolution of the federal reserved water rights of the CSKT.

A first task is to examine the purpose of the UMO and its role in the Compact. The purpose of the Unitary Management Ordinance as articulated in Article I is to govern all water rights and control all aspects of water use, including enforcement, in place of Montana Code:

> *This Ordinance shall govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation. Any provision of Title 85, MCA [State water law] that is inconsistent with this Law of Administration is not applicable within the Reservation.*

[9] U.S. v. New Mexico 438 U.S. 696 (1978); see also http://lawschool.unm.edu/nmlr/volumes/09/2/08_notes_comments_united.pdf "U.S. v. New Mexico: Beginning of a Trend to favor State Water Rights over Federal Water Rights"

The Ordinance is intended to replace Montana's statutory system for managing and administering the water resources of the State. This where the Compact Commission agreed as a *negotiation strategy* to

> *...subject or to remove non-Indian rights on the reservation from the jurisdiction and control of the state, and place that somewhere else at the tribe's request.*[10]

The question posed to the legislature is first, whether it *can* delegate its constitutional and statutory responsibilities for administration and ownership of the waters of the state to the CSKT/Bureau of Indian Affairs as proposed by the Compact Commission, and second, whether it should. A follow-up question is, when the UMO then becomes state law—in replacing the state's authority—will it have to be applied equally to other parts of the state under the equal protection doctrine?[11]

A thorough discernment and evaluation of the sufficiency of the UMO as a substitute for Montana's constitutional authority and statutory structure for administering water, and as a substitute from the usual dual-sovereign administration system employed in every other Compact, draws upon and falls within a significant body of state and federal law, as follows:

- MT and U.S. Constitutions. Both the Montana and U.S. Constitution guarantee citizens equal protection under the law. The state legislature may not and never has subjected state citizens to different rules for water administration because of where they live. The Legislature's approval of the UMO would codify it as state law, which would be constitutionally inconsistent with existing state and federal constitutions. The Compact would likely be legally challenged, *unless it was applied to everyone in the state of Montana.* Moreover, Section 4 of Article IV of the U.S. Constitution guarantees to every state of the union a republican form of government. The UMO was written by and will be controlled by the CSKT,[12] and is not a state-tribal organization within the meaning of Montana law.[13] The government of the CSKT, in which non-Indians living on private land within the Indian reservation have no vote, does not have the same form of government within which Montanans reside, nor is it subject to the same rules as other Montana citizens or local governments. The CSKT, on the other hand, have two votes—both in their Tribal government but also in non-Indian government as American citizens. The UMO on its face fails the constitutional test of equal protection and failure to equally represent all

[10] Statement of Chris Tweeten explaining the Unitary Management Ordinance, August 2012.

[11] For example, the Compact provides that the development of exempt wells will be limited to 2.4 acre feet per acre on the reservation under the UMO, which will become state law (page 86, UMO, Section 2-2-117 part 5). The state-wide rate for exempt wells is 10 acre feet per acre. Since the UMO will be codified as state law, will all exempt wells be limited to 2.4 acre feet per acre?

[12] Tribal control over the UMO and UMB is assured through the appointment process. First, the Governor must appoint two individuals; the standard protocol for these appointments is that the Governor makes a choice from individuals recommended by the Tribe. The Tribes then appoint two people, and together, these four appoint a fifth member. The Board members are political appointees accountable to the Tribes and the Governor and are responsible for implementing the UMO using data provided by the Tribal Water Engineer.

[13] That is, created specifically by statute, or pursuant to the state-tribal cooperative agreement statute, a memorandum of understanding, or other mechanism. The UMO intends to replace state law so there would be no need for a state-tribal UMB.

citizens. The UMO—controlled by a Tribal government-- also fails in constitutional form to qualify as a governing system applicable to non-Tribal residents on private land within the Flathead Indian Reservation who have no representation in the government purporting to regulate them.[14]

- State and Federal law. There is an overlay of additional state and federal law and precedent that complicate yet inform decision-making regarding the inclusion of the UMO Compact. First is the federal law P.L. 280, which granted to certain states jurisdiction over civil and criminal matters on reservation[15]. Although Montana was not an original "PL 280 state", the CSKT negotiated with the State of Montana for it to assume jurisdiction over certain civil and criminal matters within the CSKT reservation.[16] The UMO's proposal to take over the state's enforcement authorities in civil or criminal matters regarding water administration may present legal difficulties with the actual field administration and enforcement of the UMO. The UMO could create an illegal trespass problem and should be examined in light of existing law enforcement arrangements and protocol, streamlining efficiencies, and consideration of public acceptance of Tribal law enforcement for water administration. At the heart of the UMO is the Tribes' claim to ownership of all the water on the reservation. Federal law on the subject is clear that the Tribes' are entitled to the amount of water to meet the purposes of the reservation under the federal reserved rights doctrine. The State Constitution and law assert the complete ownership of all water in Montana and the state's authority to provide for the administration of the waters of the state. The State constitution agrees that federal law applies to control over Indian affairs and reservation lands. Thus neither state nor federal law support the CSKT's contention that it owns all the water on the reservation and water rights off-reservation. Neither state nor federal law support Tribal administration of non-Indian water users within the exterior boundaries of an Indian Reservation.
- Indian Reorganization Act of 1934 (IRA). The IRA has several important provisions that pertain to the approval of the UMO as part of the CSKT Compact. First, the IRA specifically retained and did not impact the valid, existing land and water settlement and claims that existed on the Flathead Indian Reservation as of 1934.[17]. Second, the IRA did not affect any land within the

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[14] To the extent that the UMO could lead to taxation of reservation residents regarding permits, licenses, or water administration services, the Tribes' UMO would be akin to taxation without representation.

[15] In 1963, the Montana Legislature passed legislation that allowed the state to assume "280" jurisdiction over tribal members on the Flathead Reservation. See footnote 25 The legislation also allowed the state to assume jurisdiction over other Indian tribes if those tribes requested it. See footnote 26 The bill also provided a method for tribes to withdraw their approval to P.L. 280 jurisdiction.

[16] From the same link as FN14, *"Ordinance 40-A (revised) was enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes in 1965. The ordinance authorized the state to assume concurrent jurisdiction over tribal members for all criminal laws and eight areas of civil law: compulsory school attendance; public welfare; insanity; care of the infirm, aged, and afflicted; juvenile delinquency and youth rehabilitation; adoption (with tribal court approval); abandoned, dependent, neglected, orphaned, or abused children; and operation of motor vehicles on public roads".*

[17] For example, by 1926, 80% of the lands irrigated by the federal irrigation project were owned by non-Indians (successors to Indian allottees) and 20% owned by Indians. Flathead Power Development Flathead Power Development: Memorandum on the Development of Flathead River Power Sites, Montana, Senate Report 153, 71st Congress 2d Session, 1930

reclamation projects on Indian reservations and thus may prohibit the Tribe from buying land within the reclamation project for a purpose other than irrigation. Third, the CSKT is an IRA Tribe and is required to submit any land, water or other natural resource use ordinance to the Secretary of the Interior for approval.[18] The UMO is a tribal ordinance that has not been approved by the Secretary. The Compact proposes to substitute the State legislature's approval of the UMO for the Secretary's approval. However, a state cannot substitute its approval for the federal function of the Secretary's approval of the UMO under the authority of the IRA.

- P.L. 93-638, the Indian Education and Education Assistance Act. This Act allows Tribes to contract federal programs that are created for Indians "because of their status as Indians" and is relevant because the UMO would be the state equivalent of a federal 638 program. The CSKT have contracted the BIA's Realty Program and conduct all of the processing on sales of land from fee to trust and vice versa[19]. The CSKT have tried to contract the federal irrigation project under the "638" program but have failed because the irrigation project was not built solely for the Tribes—it was built for non-Indian settlers as well. The UMO is essentially a proposal to "contract" the State's water management function on the reservation for all water users. As if the water, irrigation project, water distribution infrastructure and wells were put there for the Tribes' use only. The Tribe would be accountable to no one. If a Tribal government as a sovereign entity can contract an essential inherent state function like water administration paid for by and affecting hundreds of thousands of people, what program is next?
- McCarran Amendment. The McCarran amendment allowed the adjudication of federal reserved water rights in state courts as part of the comprehensive proceedings involved in general stream adjudication. It defers to state law and forums for adjudication and administration of the water right. The administration of water is not typically covered In a McCarran Amendment legal proceeding other than deferring to state law.
- Administration of Water in Indian Water Settlements, Montana Indian Compacts, Adjudication Proceedings. The administration of water in Indian water settlements, or even in litigation, does not always follow the same path. In many instances the Tribes develop their own water code system, with the state maintaining management over state based water rights and in some cases even Walton rights. No litigation or negotiation in the United States has awarded full Tribal administrative authority over non-Indians even within a reservation. The precedential implications of this have not been addressed.
- Federal Indian Law: Sovereignty and Self-Determination[20]. The earliest Treaties with Tribes in the United States and case law involving the status of Indian Tribes as sovereigns reaffirms the 'domestic dependent nation' status of Tribes with the sovereign right to be self-determined, that is, to make their own laws and determine their own future. The ability to make one's own laws and self-govern is a vastly different concept than governing and determining everybody

[18] While decision-making for some ordinances can be delegated to the BIA's Portland Area Office Regional Director, this ordinance would have to be vetted at the D.C. level through all the divisions of the Interior Department and the Department of Justice.

[19] The CSKT Realty Office and the BIA recently were sued by a Polson resident over trust to fee and fee to trust patent irregularities.

[20] Cohen, Felix S., 1982 ed., Handbook of Federal Indian Law

else's future. The scope of a proper jurisdictional analysis reveals that in the context of Tribal sovereignty, the UMO is applicable only to the Tribe and its members, not non-Indians on the reservation[21].

- Remedies: Court of Competent Jurisdiction. The UMO provides three different court levels available to those seeking relief from actions of the Tribal Water Engineer and UMB, in addition to providing an appeal process through the UMB prior to a court option. The "court of competent jurisdiction" can include Tribal, state district, or federal court all with different competencies in terms of water law, use, or administration issues,

Conclusions and Recommendations

Under the precedent, history, and existing law described briefly above, the UMO is not sufficient to meet the constitutional, statutory, administrative, due process, or legal requirements for water administration that would effectively replace the state's water administration program for its citizens.[22] There is no compelling legal requirement or other reason to substitute the State's water administration system with the untested UMO.[23] The federal reserved water right for the CSKT can be negotiated in a Compact but the UMO is not legally necessary for or required to quantify the Tribes' reserved water right.

The UMO could form a good basis for the CSKT's management and protection of its own federal reserved water resources on reservation, and how it interacts with state and federal agencies in the management and development of water resources.[24]

An alternative water administration system exists that has been employed by the Compact Commission in previous Compacts. It consists of the dual sovereign management system and a Compact Board to resolve problems with implementation of the Compact before resorting to Court. In the case of the CSKT Compact, such a Compact Board may need to be developed and staffed more fully to ensure local responsiveness, sufficient water court direction, problem solving, and relevant knowledge.

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[21] The UMO is a Tribal Water Code expanded to include all reservation residents. It contains the Tribal objectives of spiritual, cultural, and fisheries purposes for the use of water, which are of course valid, but are not the only beneficial uses on the reservation.

[22] As shown by this review, no amount of additional detail provided for the UMO, or small adjustments to its contents, can change the fact that no state or federal law permits the wholesale abandonment of a class of state citizens to a new form of government regarding water use and development just because of where they live. A negotiated settlement does not give carte blanche to any party to "work around" existing law, policy, legal prohibitions, or history.

[23] A final evaluation of existing law and the framework for approving or disapproving the UMO includes an analysis of the capability of the CSKT to manage and administer the water resources on the entire reservation. Examples of Tribal management can be drawn from the National Bison Range, the former Cooperative Management Entity (CME) for the federal irrigation project and the gillnetting of Flathead Lake. The three examples cited demonstrate that the CSKT are not yet capable of managing the water resources and water rights of 28,000 residents of the reservation, its towns, or its cities.

[24] If viewed in this manner, the UMO would not have to be codified as a new part of State law.